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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

LINDA KUWATA et al.,

Plaintiffs and Appellants,

v.

CAMARILLO COMMUNITY CARE,
INC. et al.,

Defendants and Respondents.

B290539

(Los Angeles County
Super. Ct. No. BC595304)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elizabeth R. Feffer, Judge. Affirmed.

Browne George Ross, Peter W. Ross and Ira Bibbero for
Plaintiffs and Appellants.

Murchison & Cumming and Edmund G. Farrell for
Defendants and Respondents.

* * * * *

An elderly woman sued the skilled nursing facility where she stayed for several months for elder abuse, but a jury rejected her claim on the ground that any lapse in care by the facility was not a substantial factor in causing her harm. On appeal, she argues that the trial court erred in not allowing her to recall one of her expert witnesses in rebuttal. We conclude there was no error, and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

Linda Kuwata (Kuwata) was a patient at the Camarillo Healthcare Center (Camarillo), a 114-bed skilled nursing facility, from December 30, 2014 through April 2, 2015.

A. *Kuwata's medical condition upon arrival*

Kuwata was 79 years old at the time of her admission to Camarillo. Immediately prior, she was a patient at Kindred Memorial Hospital.

At the time she was admitted to Camarillo, Kuwata was already suffering from several medical conditions. She had previously suffered two strokes (one in 1997 and another around 2013), rendering the left side of her body “paralyzed” into a rigid position and otherwise impairing her coordination and movement. She was just recovering from brain surgery she had undergone to relieve pressure from a subdural hematoma she suffered from a fall in October 2014. Her arm was broken and in a splint; what is more, the broken bone had become infected. She also had recurring urinary tract infections. Kuwata was overweight, suffered from diabetes, hypertension and deep vein thromboses, and had peripheral vascular disease that affected blood flow to her extremities. The flesh of her left foot was dead due to dry gangrene. She was malnourished and dehydrated.

Kuwata also arrived at Camarillo with four skin ulcers. Specifically, she had (1) a “stage two” ulcer on her tailbone (which, medically, is referred to as the “sacral” or “coccyx”), (2) a stage two ulcer on her right buttocks, (3) a stage one ulcer on her heel, and (4) a stage two ulcer on her elbow. The “stage” refers to the depth of the ulcer: A stage one ulcer is on the surface of the skin; a stage two ulcer is open down to the “dermal area” of the skin; a stage three ulcer is open down to the “fat and connective tissue” below the skin; and a stage four ulcer (the deepest) is open to the “muscle, bone, major blood vessels, [or] other organs.” An “unstageable” ulcer is one whose depth cannot be determined because it is covered by a scab or flap of loose skin.

B. *Kuwata’s temporary stays in other facilities*

Kuwata’s stay at Camarillo had two interruptions. Between January 3 and January 6, 2015, Kuwata stayed at Community Memorial Hospital. And between January 15 and January 21, 2015, Kuwata stayed at St. John’s Pleasant Valley Hospital (St. John’s). Kuwata was transferred to St. John’s due to her high blood sugar and a fever, and while at St. John’s, was noted as having “severe sepsis” and a urinary tract infection.

C. *Kuwata’s condition while at Camarillo*

To combat Kuwata’s infections, Camarillo doctors and staff administered a course of antibiotics.

To combat her malnutrition, Camarillo doctors and staff continued to feed her through a previously implanted feeding tube and supplemented those feedings with pureed foods she could ingest orally. Kuwata ended up gaining weight while at Camarillo.

To combat the skin ulcers, Camarillo doctors and staff (1) cleaned and dressed the wounds, (2) installed a “pressure

redistributing mattress” and (3) adopted a plan to reposition Kuwata as much as feasible to minimize the pressure on those wounds from the weight of her body. Regarding the cleaning and dressing of the wounds, Camarillo staff provided evolving treatment of the ulcer on Kuwata’s tailbone—at first, they cleaned it and then treated it with “barrier cream” and dry gauze, then they prescribed “Santyl ointment” (rather than barrier cream) to dissolve and remove the dead tissue, and finally they used Dakin’s moist gauze packing to clean the wound and keep down the bacteria. As a result of this regimen, the ulcers on Kuwata’s buttocks, heel and elbow healed. However, the ulcer on her tailbone progressed to a stage three by January 29, 2015 and, while diagnosed by Camarillo as “unstageable” by March 22, 2015, the ulcer became so deep that Kuwata’s adult daughter believed she could “stick [her] fist inside” the wound once the skin covering the ulcer was probed (which would clearly qualify the wound as stage four). Although a swab of the wound’s surface on April 2, 2015 showed some fecal bacteria near the surface of the tailbone ulcer and an MRI showed what could have been pus inside of the wound, doctors from another facility who examined the wound determined that it did not look infected to the naked eye, had no pus, and was “nontoxic.”

D. *Kuwata’s care after release from Camarillo*

After brief stays at other health care facilities in the spring of 2015, Kuwata was ultimately released to the care of her adult son. He continued to clean and dress the tailbone ulcer using a product called “Dermawound” that he located after doing a Google search on the Internet. Dermawound’s active ingredient is a local antiseptic. The ulcer closed up considerably, although

not completely. While under her son's care, Kuwata developed other pressure ulcers elsewhere on her body.

II. Procedural Background

A. Complaint

In the operative, First Amended Complaint as amended by two erratas, Kuwata sued the corporate entity that operates Camarillo as well as four related entities (collectively, defendants)¹ for elder abuse (Welf. & Inst. Code, §§ 15610.07, 15610.57, subd. (b)), and Kuwata's adult son and daughter sued defendants for intentional and negligent infliction of emotional distress.² They sought at least \$1 million in compensatory damages as well as punitive damages.

B. Trial

The trial was largely a battle of the experts.

1. Expert testimony, generally

Kuwata, her adult son and her adult daughter (collectively, plaintiffs) called two expert witnesses—Dr. Loren Lipson (Dr. Lipson) and nurse Charlotte Sheppard (Sheppard). Each expert

¹ The entity that operates Camarillo is Camarillo Community Care, Inc., and the four related entities are The Ensign Group, Inc., Ensign Services, Inc., The Flagstone Group, Inc. and Granada Investments, LLC. Granada Investments, LLC was dismissed from the action prior to trial.

² Kuwata also brought claims against the Camarillo defendants for negligence and for negligence premised on the violation of various California and federal statutes and regulations, but dismissed those claims during trial. Kuwata brought a variety of claims against a hospital and other entities as well, but those claims settled or were dismissed prior to trial.

opined that Camarillo's care of Kuwata fell below the applicable standard of care because Camarillo (1) did not provide her proper nourishment, and (2) allowed her tailbone ulcer to worsen by (a) not repositioning her body every two hours to avoid excess pressure on the wound, (b) not using devices (such as special mattresses and wheelchair seats) to reduce the pressure on the wound, and (c) not properly cleaning the wound. Both experts' opinions on the quality of Camarillo's care relied, in whole or in part, on the "outcome"—that is, on the fact that Kuwata's wound "deteriorated dramatically" while she was in Camarillo's care.

Defendants called four experts: (1) Kuwata's treating physician at Camarillo, Dr. Peter Allan (Dr. Allan), and (2) three expert witnesses—Dr. Robert Wang (Dr. Wang), Dr. William Klein and nurse Mary Ransbury (Ransbury). Both Dr. Wang and Ransbury opined that Camarillo's care of Kuwata was appropriate. Dr. Wang and Ransbury opined that Camarillo provided Kuwata with proper nourishment. And all four defense experts explained that the staged progression of the tailbone ulcer was not due to any lapse in care by Camarillo because (1) the progression of the ulcer was due in large part to Kuwata's myriad of health conditions that made it very difficult for the natural healing process to work, (2) repositioning Kuwata's body every two hours was not medically advisable and was not feasible with a patient, like Kuwata, who was suffering from rigid paralysis of half of her limbs, wearing an arm splint, and hooked to a feeding tube that required elevation of her head, and (3) the wound was properly cleaned because, upon release from Camarillo, the wound was not infected.

2. *The rebuttal kerfuffle*

During his testimony, Dr. Wang offered one further reason why the progression of Kuwata's tailbone ulcer from stage two to stage four was not due to any lapse in care by Camarillo—namely, that her ulcer wound was, in fact, *two* ulcers: The first ulcer was the stage two pressure-caused ulcer she had when she arrived at Camarillo, and the second was a “deep tissue injury” that developed during her brief stay at St. John's in January 2015. In Dr. Wang's opinion, the deep tissue injury *formed* at Kuwata's tailbone and, as such injuries do, it slowly “expanded out to the surface” where it surfaced as a large hole. Thus, what plaintiffs' experts characterized as a surface ulcer that had grown *deeper* due to pressure was, in Dr. Wang's opinion, a deep tissue ulcer that was healing by rising up to the surface. For support of his opinion that Kuwata was suffering from a simultaneous deep tissue injury, Dr. Wang relied upon (1) a notation in a Camarillo record on January 14, 2015 referring to a “suspected deep tissue injury,” (2) a notation in a St. John's record on January 16, 2015 referring to a “deep tissue injury,” (3) the absence of any infection deep in the wound, as noted in the April 2015 examination, and (4) the post-release healing of the wound through the application of only a local anesthetic, which would have been medically possible only if the injury was already present at the time Kuwata received her antibiotics treatment (which predated the time when the ulcer was stage four).

Plaintiffs did not object to Dr. Wang's opinion on this point. Instead, they crossed Dr. Wang extensively regarding (1) the absence of any other notation, during the months Kuwata was at Camarillo, regarding a “deep tissue injury,” and (2) the presence

of fecal bacteria on the swab of Kuwata's wound during the April 2015 examination.

Plaintiffs also sought to recall Dr. Lipson as a rebuttal witness. When plaintiffs started by asking Dr. Lipson what a deep tissue injury was, defendants objected that his testimony was "improper rebuttal." Plaintiffs noted that Dr. Wang had not mentioned the term "deep tissue injury" during his pretrial deposition, but they did not move to strike Dr. Wang's trial testimony. Defendants responded that Dr. Wang had, during his deposition, insisted that describing Kuwata's tailbone ulcer as a "pressure ulcer" did not "describe[] the etiology [that is, the cause]" of the wound because the "appearance" of an ulcer can be "the same[] whether it's caused by excess pressure or other types of insults." What is more, Dr. Wang had assured plaintiffs' counsel [during the deposition] that his deposition testimony had covered the "general areas" of his expected testimony, but that "there may be details that you've asked me about that we haven't covered."

The trial court sustained defendants' objection to Dr. Lipson's rebuttal testimony on two grounds. First, the court ruled that recalling Dr. Lipson was "improper impeachment" because Dr. Wang had just been "asked to comment on St. John's records," which had been "made available to both sides" and on which there had been "ample cross-examination." Second, the court concluded that Dr. Lipson's rebuttal was not "relevant for [Evidence Code] section 352"³ because "[t]his area has been fully exhausted."

³ All further statutory references are to the Evidence Code unless otherwise indicated.

C. *Verdicts*

The jury returned verdicts for defendants. With regard to the elder abuse claim, the jury found that (1) Camarillo had been responsible for Kuwata; (2) Camarillo had “fail[ed] to use the degree of care that a reasonable person in the same situation would have used in providing for . . . Kuwata’s basic needs,” and the special verdict form enumerated five different areas, including “[p]reventing malnutrition or dehydration” and “[p]reventing avoidable progression of bed sores”; and (3) Kuwata “was harmed.” However, the jury also found that Camarillo’s “conduct was [not] a substantial factor in causing . . . Kuwata’s harm.”

D. *Post-Verdict and Appeal*

Plaintiffs moved for a new trial on the ground that the verdicts were against the weight of the evidence. The trial court denied the motion.

Plaintiffs filed this timely appeal.

DISCUSSION

In their briefs, plaintiffs argued that the trial court erred in not allowing Dr. Lipson to testify on rebuttal—and that they are entitled to reversal on Kuwata’s elder abuse claim and the adult children’s emotional distress claims—because (1) Dr. Lipson’s rebuttal testimony qualifies as impeachment evidence, (2) the probative value of Dr. Lipson’s rebuttal testimony is not substantially outweighed by countervailing concerns under section 352, and (3) Dr. Wang surprised plaintiffs with testimony beyond the scope of his deposition testimony. For the first time at oral argument, plaintiffs argued that (4) Dr. Lipson’s testimony constituted proper rebuttal testimony even if it *was not* impeachment evidence because Dr. Lipson had been previously

disclosed as a witness and the rule limiting rebuttal testimony to impeachment evidence only applies to undisclosed witnesses.

Many of these claims are not properly before us. Plaintiffs did not argue that Dr. Lipson's excluded rebuttal testimony had any effect on the adult children's emotional distress claims until their reply brief; their failure to raise the issue in their opening brief constitutes a waiver of that issue. (*People v. Smithey* (1999) 20 Cal.4th 936, 1017, fn. 26.) Plaintiffs did not object to Dr. Wang's testimony at trial regarding the topic of a deep tissue injury and did not subsequently move to strike that testimony or raise the issue in their new trial motion; they cannot attempt to do so now under the guise of an argument regarding prejudicial surprise. (§ 353; *People v. Frank* (1990) 51 Cal.3d 718, 732-733.) And plaintiffs did not argue in their briefs that Dr. Lipson's testimony was admissible as the proper rebuttal testimony of a disclosed witness; they may not do so for the first time at oral argument. (*Kinney v. Vaccari* (1980) 27 Cal.3d 348, 356, fn. 6.)

The only argument we will address is plaintiff's argument that the trial court erred in excluding Dr. Lipson's testimony under section 352. We decline to exercise our discretion to overlook plaintiffs' forfeiture of their argument challenging Dr. Wang's testimony which was never presented to the trial court. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293 [discretion to excuse forfeiture "should be exercised rarely and only in cases presenting an important legal issue"].) And we have no occasion to reach either of plaintiffs' arguments asserting that Dr. Lipson's proffered testimony was proper rebuttal testimony (either as proper impeachment evidence or as proper rebuttal testimony of a previously disclosed witness) because, as we conclude, Dr. Lipson's testimony was properly excluded under section 352 and

a single viable basis for exclusion is sufficient to affirm an exclusionary ruling (e.g., *Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 565).

I. Section 352

Section 352 grants trial courts “discretion” to “exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (§ 352.) We review a trial court’s exclusion of evidence under section 352 for an abuse of discretion. (*People v. Peoples* (2016) 62 Cal.4th 718, 743, 745.)

The trial court did not abuse its discretion in excluding Dr. Lipson’s proffered rebuttal testimony under section 352. That testimony looked to have minimal probative value. Plaintiffs had already extensively cross-examined Dr. Wang, including eliciting that all of the other medical records referred to Kuwata’s injury as a “pressure ulcer” and not a “deep tissue injury.” Plaintiffs’ other expert witness, Sheppard, had also already opined that Kuwata’s injury was caused by pressure, and thus not by some other mechanism: “Pressure sore[s] form[] from prolonged pressure,” she opined, “I mean, it’s pretty fundamental in the name . . . it’s called a pressure injury.” Dr. Lipson’s anticipated rebuttal testimony (which was proffered for the first time in the opening brief on appeal) that, in his opinion, Kuwata’s injury was caused by pressure and that Camarillo’s care was deficient even if Kuwata’s injury had been a deep tissue injury, would have been largely duplicative of evidence already before the jury. On the other side of the ledger, calling Dr. Lipson to state opinions

already before the jury would “necessitate undue consumption of time.”.

Plaintiffs offer two further arguments in response. First, they assert that there would have been no “[u]ndue prejudice” because Dr. Lipson’s testimony would not have elicited any emotional response. This assertion rests on the correct definition of “undue prejudice” (*People v. Valdez* (2012) 55 Cal.4th 82, 133 [“prejudice” for this purpose means “emotional bias”]), but overlooks that undue consumption of time is an independent and sufficient basis for excluding Dr. Lipson’s rebuttal testimony under section 352. Second, plaintiffs contend that Dr. Lipson’s rebuttal testimony would not have taken too long to present. This overlooks that the substance of his proffered testimony, as noted above, was cumulative of other evidence. (*People v. Mincey* (1992) 2 Cal.4th 408, 439 [“Cumulative evidence may be excluded” under section 352].)

II. Prejudice

Even if we assume that the trial court erred in excluding Dr. Lipson’s rebuttal testimony, plaintiffs have not carried their burden of proving that they were prejudiced by this exclusion. An erroneous evidentiary ruling warrants reversal only when it results in a “miscarriage of justice.” (Cal. Const., art. VI, § 13; Civ. Proc. Code, § 475.) A miscarriage of justice exists only when “it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

It is not reasonably probable that the exclusion of Dr. Lipson’s proffered rebuttal testimony would have led to a different outcome for two reasons. First, and for the reasons discussed above with regard to its probative value, that

testimony would have added little to the evidentiary mix that was already before the jury due to the cross-examination of Dr. Wang and the testimony of plaintiffs' other expert. Second, plaintiffs told the trial court *four different times* that they would not need to call Dr. Lipson for rebuttal and that they had "nothing to be concerned about" as long as defendants agreed not to argue in closing that Kuwata's injury was a deep tissue injury. Although defendants refused to so agree at the time, defendants' closing argument ultimately contained no reference at all to Kuwata's injury as being a deep tissue injury. Thus, under plaintiffs' own view of the case, the exclusion of Dr. Lipson's rebuttal testimony was of no moment.

DISPOSITION

The judgment is affirmed. Defendants are entitled to their costs on appeal.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P.J.
ASHMANN-GERST

_____, J.
CHAVEZ